

APPENDIX

Supreme Court of the United States

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APPENDIX

Supreme Court of the United States

October Term, 1971

No. 71-1134

HARRY ROADEN - - - - - *Petitioner*

v.

COMMONWEALTH OF KENTUCKY - - - *Respondent*

CHRONOLOGICAL LIST OF PROCEEDINGS BELOW

- 9-29-70 Petitioner arrested and film seized by Sheriff of Pulaski County, Kentucky.
- 9-30-70 Indictment returned.
- 10- 3-70 Petitioner entered a plea of not guilty.
Case set for trial on October 20, 1970.
- 10-12-70 Petitioner filed motion to suppress evidence and dismiss indictment.
- 10-16-70 Hearing held on Petitioner's motion to suppress evidence and dismiss indictment.
- 10-20-70 Petitioner's Motion to suppress evidence and dismiss indictment overruled by Judge Hail.
Trial, Pulaski Circuit Court, Lawrence S. Hail, Judge.
Order adjourning court until October 21, 1970.
- 10-21-70 Trial concluded, Pulaski Circuit Court, Lawrence S. Hail, Judge.
Verdict returned in open court, reading as follows: "This jury finds the motion picture Cindy and Donna obscene." /s/ Paul Elliott, Foreman
"We the jury finds the defendant Harry Roaden guilty as charged set his punishment \$1,000 fine

and six months in jail. /s/ Paul Elliott, Foreman."

Judgment of Pulaski Circuit Court.

- 10-27-70 Petitioner filed Notice of Appeal to Kentucky Court of Appeals.
- 12-18-70 Petitioner filed Statement of Appeal, \$25.00 filing fee, 1 volume transcript of record and 1 volume transcript of evidence and Motion for Appeal and Notice.
- 1-26-71 Petitioner filed brief with the Kentucky Court of Appeals.
- 4-15-71 Commonwealth of Kentucky filed brief with the Kentucky Court of Appeals.
- 4-16-71 Case submitted.
- 6-25-71 Opinion of Court of Appeals of Kentucky by Commissioner Davis affirmed Judgment of the Pulaski Circuit Court.
- 8-18-71 Petitioner filed Petition for Rehearing with the Kentucky Court of Appeals.
- 10- 7-71 Commonwealth of Kentucky filed Response to Petition for Rehearing.
- 12-17-71 Rehearing denied by Kentucky Court of Appeals. Mandate Issued.
- 12-28-71 Petitioner filed Motion To Stay Execution and Enforcement of Mandate (affidavit attached).
- 1-14-72 Motion To Stay Execution and Enforcement of Mandate sustained for a period of 90 days from January 14, 1972.
- 4- 3-72 Petitioner filed Motion For Extension of Stay of Execution and Enforcement of Mandate (affidavit attached).
- 4-18-72 Extension of Stay of Execution and Enforcement of Mandate granted for a period to and including May 18, 1972.

5-10-72 Petitioner filed Motion for Additional Extension of Stay of Execution and Enforcement of Mandate (affidavit attached).

INDICTMENT

PULASKI CIRCUIT COURT

(R. 3, 4)¹

COMMONWEALTH OF KENTUCKY - - Respondent

v. Indictment No. 4432
KRS Sec. 436.101

HARRY ROADEN - - Defendant

The grand jury charges:

On or about the 29th day of September 1970 In Pulaski County, Kentucky, the above named defendant did unlawfully and wilfully publish and exhibit, or had in his possession with intent to publish and exhibit, an obscene motion picture entitled "Cindy and Donna".

Contrary to the form of the statutes in such cases made and provided and against the peace and dignity of the Commonwealth of Kentucky.

A True Bill

/s/ John T. Kelley

Foreman.

Harold Rogers
Commonwealth's Attorney
28th Judicial District
of Kentucky

¹"R" refers to Clerk's Transcript of Record. "T" refers to Reporter's Transcript of Evidence.

On the back of said indictment appears the following:

#4432

The Commonwealth of Kentucky

Indictment for
Showing Obscene
Motion Pictures

v.

Harry Roaden

Address

A True Bill

Name	Witnesses Address	Phone
Gilmore Phelps	County Sheriff	
James Strunk	Deputy Sheriff	
John Henry Johnson	Deputy Sheriff	

Presented by the foreman of the Grand Jury to the Court in the Presence of the Grand Jury and received by me from the Court and filed in open Court on the 30th day of September 1970

Bail \$500 Summons

/s/ Delvin Holt
Pulaski Circuit Court Clerk

PULASKI CIRCUIT COURT

ORDER RECITING PLEA AND SETTING TRIAL DATE

(R. 5)

Pulaski Circuit Court
 Regular September Term
 24th day of the term
 October 3, 1970

COMMONWEALTH OF KENTUCKY Plaintiff

v. ORDER #4432 Showing Obscene Picture

HARRY ROADEN Defendant

The defendant this day appeared in open court represented by Hon. M. D. Harris, He waived arraignment and entered a plea of not guilty to above charge. The court set his case for trial on October 20, 1970.

/s/ Lawrence S. Hail, Judge
 Pulaski Circuit Court.

PULASKI CIRCUIT COURT
PETITIONER'S MOTION TO SUPPRESS EVIDENCE
AND DISMISS INDICTMENT

(R. 6, 7, 8)

Pulaski Circuit Court
 Regular October Term
 1st day of the Term
 October 12, 1970

COMMONWEALTH OF KENTUCKY - - - - - *Plaintiff*

v. **MOTION TO SUPPRESS EVIDENCE**
AND DISMISS INDICTMENT #4432

HARRY ROADEN - - - - - *Defendant*

This day came counsel for defendant and produced and filed Motion to suppress evidence and dismiss indictment herein, which is now noted of record.

/s/ Lawrence S. Hail, Judge
 Pulaski Circuit Court.

The Motion to Suppress Evidence and Dismiss Indictment as referred to in the last Order is in words and figures as follows, to-wit:

PULASKI CIRCUIT COURT
 COMMONWEALTH OF KENTUCKY - - - - - *Plaintiff*

v. **MOTION TO SUPPRESS EVIDENCE**
AND DISMISS INDICTMENT #4432

HARRY ROADEN - - - - - *Defendant*

Comes now the defendant by counsel, and moves the Court to suppress the evidence and dismiss indictment No. 4432 returned thereon on the following grounds:

1. That the evidence was improperly, unlawfully and illegally seized, contrary to the procedure provided by Statute and the laws of the land.

2. That without the improperly, unlawfully and illegally seized evidence an indictment would not be returnable, and therefore, should be dismissed.

Harris & Wicker
120 North Main Street
Somerset, Kentucky
Attorneys for Defendant
By /s/ Phillip K. Wicker

NOTICE

TO: Hon. Harold Rogers
Commonwealth's Attorney
28th Judicial District
Somerset, Kentucky

Please take notice that the foregoing Motion to Suppress Evidence and Dismiss Indictment will be brought on for hearing before Hon. Lawrence S. Hail, Judge of the Pulaski Circuit Court, in the Court Room at Somerset, Kentucky, on Friday, October 16, 1970, at 2:00 P.M. or as soon thereafter as the business of the Court will permit. This 12th day of October, 1970.

/s/ Phillip K. Wicker
Counsel for Defendant

(Certificate of service omitted in printing)

PULASKI CIRCUIT COURT

TRANSCRIPT OF EVIDENCE IN COMMONWEALTH
OF KENTUCKY V. ROADEN, OCTOBER 20 AND
21, 1970

(T. 4)

Honorable P. K. Wicker: One thing I can anticipate by watching the trial the outcome of the ruling on the motion to suppress.

The Court: Let it be overruled, unless you want to have something to say.

Honorable P. K. Wicker: I don't know of anything else to add, certainly we can't add anything we didn't bring up Friday.

Honorable M. D. Harris: To what we did say.

.

The Court: Overruled.

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(T. 20)

The first witness called by counsel for the Commonwealth SHERIFF GILMORE PHELPS being first duly sworn, in response to questions propounded to him by the Attorneys, both for the Commonwealth and the defendant, stated as follows, to-wit:

Direct Examination by Mr. Rogers

Q. 1. State your name, please?

A. Gilmore Phelps.

Q. 2. What is your occupation?

A. Sheriff of Pulaski County.

Q. 3. How long have you served as Sheriff of Pulaski County?

A. Since January 4th '70, this year.

Q. 4. Have you served previously as Sheriff of this county?

A. Yes, sir.

Q. 5. When did you serve?

A. I have served two terms previously.

Q. 6. What is the length of the terms that you have served?

A. Four years, four years each.

Q. 7. So you are going on your ninth or tenth year as Sheriff?

A. Yes, sir.

Q. 8. Sheriff, are you the chief law enforcement officer of Pulaski County, Kentucky?

A. Yes, sir.

Q. 9. Directing your attention to the date of September 29th 1970 did you have occasion at that time to view a motion picture in this county?

A. Yes, sir.

Q. 10. Where and when did you view the movie?

A. At Highway 27 Drive-In on South 27.

Q. 11. Do you know what time it was?

(T. 21)

A. The time of it?

Q. 12. The time of day?

A. It was at night.

Q. 13. That is a drive-in theatre I believe you said?

A. Yes, sir.

Q. 14. Would you briefly describe the lay-out of a drive-in theatre or this drive-in theatre?

A. Well, of course, it has to show of a night due to the light on the screen, of course, the voices are carried through speakers to each vehicle, you sit in your car and watch the movie from your automobile.

Q. 15. Did you view the entire movie that night?

A. Yes, sir.

Q. 16. What was the name of the movie?

A. Donna and Cindy.

Q. 17. Was it Cindy and Donna or Donna and Cindy?

A. Cindy and Donna.

Q. 18. Were there people other than yourself there that night?

A. Yes, sir.

Q. 19. Could you tell who they were?

A. Well, they was several people there, no, sir, I couldn't.

Q. 20. Were they members of the general public so far as you knew?

A. Yes, I would say so.

Q. 21. How did you gain access to the theatre?

A. Through the main entrance, through the gate.

Q. 22. Did you go in without paying?

A. No, sir, I paid.

Q. 23. You paid the admission price?

A. Yes, sir.

Q. 24. Was this in Pulaski County, Kentucky?

A. Yes, sir.

(T. 22)

Q. 25. What did you do, if anything, after viewing the moving picture Cindy and Donna?

A. We, I'll say we arrested, I did, Mr. Roaden and seized the film.

Q. 26. Are you indicating the defendant Harry Roaden?

A. Yes, sir, the one here with Mr. Harris and Mr. Wicker.

Q. 27. Where was he at the time?

A. In the projection room where the film was shown from.

Q. 28. What was he doing, if anything, at the time you arrested him?

A. He had shown the film at the conclusion of it, why—

Q. 29. Was he the operator of the machine at the time?

A. Yes, sir.

Q. 30. Do you know who operates the Drive-In theatre itself?

A. Mr. Roaden.

Q. 31. What did you charge the defendant with at that time Mr. Sheriff?

A. The showing of an obscene movie to the general public.

Q. 32. Did you later appear within twelve months before the Pulaski County Grand Jury in the securing of this indictment?

A. Yes, sir.

Q. 33. Would you briefly describe to the Court and Jury the general nature of what the motion picture showed on the screen there at the Drive-In Theatre that night?

A. Well, the title of it was Cindy and Donna which is two female names, and—

Honorable M. D. Harris: Your Honor, I object to this defendant describing it because the film itself is the best evidence, Mr. Phelps, of necessity would only be giving his impression or opinion, and not finding facts—

(T. 23)

The Court: Well, I presume the film is going to be introduced in evidence.

Honorable Harold D. Rogers: Yes, sir.

The Court: I think, Mr. Harris, it would be permissible for the Sheriff to give a resume, so to speak, as to what the film was about, in order to identify the film, I don't think he should go into full details.

Honorable M. D. Harris: If, Your Honor, will forgive me but he could not possibly tell what the film was about, without picking out parts of the film that impressed him,

his opinion, after the jury sees the film, I don't see how the witness can answer the question without giving details as to parts of the film—

The Court: Well, I am going to permit him there as to state in substance what the film was about, without giving any, without going into details, but, as I say, I am going to permit him to tell what the film was about as a general proposition, but not to go into full details, because if the picture is exhibited to the jury, they can see the film themselves, but just for identifying, for the purpose of identifying the film that I presume will be introduced.

Q. 34. Now, subject, Sheriff, to the Court's limitations which you have heard, tell the Court and Jury about the film?

A. Well, this man and his wife, they had two daughters, one was a step-daughter, one of the daughters was hers and not his, and the step-daughter was a worldly type, older than his and her daughter, she was younger very much younger, and the picture bears out his

(T. 24)

relations with his stepdaughter—

Q. 35. Bears out his relations with who?

A. Her step father, the relations between he and her and then her trying to influence her half-sister I guess it would be in the acts of what her Father had showed her.

Honorable M. D. Harris: Show our objections to the Court's ruling and to the answer of the witness.

Q. 36. Sheriff, did the motion picture show the human anatomy uncovered to any degree?

A. Yes, sir.

Q. 37. To what degree did it show it?

A. Completely.

Q. 38. Did it show a male and female person or persons together in any intimate love scenes in the movie?

A. Yes, sir.

Q. 39. At the time you made the arrest of the defendant and took the motion picture, at that time as evidence, were you aware of the Kentucky statute against the showing of obscene motion pictures?

A. Yes, sir, I was.

Q. 40. Where is, excuse me, you say you took the film with you that night?

A. Yes, sir.

Q. 41. What did the film consist of?

A. It consisted of two canisters or cans, reels, with, I mean, cans, with one of them had three reels in it and one of them has two, what I mean by reels, the film is rolled on reels inside the canister, they're in two containers.

Q. 42. Where is the film now?

(T. 25)

A. Downstairs in my safe.

Q. 43. Have you had it in your possession and control since the night you took it from the drive-in theatre?

A. Yes, sir.

Q. 44. Is it in the same condition as it was then?

A. Yes, sir.

Q. 45. Has it been changed in any degree whatsoever?

A. No, sir.

Q. 46. With the court's permission would you go to your safe and bring the film to the courtroom?

A. Yes, sir.

Q. 47. May the witness be allowed to go, Your Honor?

The Court: Yes, sir.

• • • • •

Q. 48. Sheriff, after a short break you have retaken the stand in this case and you are still under oath you understand that?

A. Yes, sir.

Q. 49. Now, you have before you here what appears to be two metal canisters, can you identify what they are?

A. Containers of the film of Cindy and Donna.

Q. 50. Would you step out of the box around front and
(T. 26)
calling your attention to the larger of the two canisters, can
you identify what that particular container is or what it
contains?

A. Yes, sir.

Q. 51. What is it?

A. Cindy and Donna on the container and there is
my initials.

Q. 52. Now, does the container contain anything?

A. Yes, sir.

Q. 53. Would you open it up for us, please—

A. (Sheriff does as requested)

Q. 54. Now you have opened the larger of the two con-
tainers and there appears to be three reels of film inside,
can you identify those reels?

A. Yes, sir.

Q. 55. What are they?

A. The film of Cindy and Donna.

Q. 56. Is that the same thing that you got that night?

A. Yes, sir.

Q. 57. I believe you have earlier testified that these are
in the same condition as the night when you took them, is
that correct?

A. Yes, sir.

Q. 58. Will you introduce the three reels?

Honorable P. K. Wicker: Objection, Your Honor, on the
same grounds previously stated, we renew our motion to
suppress the films themselves, the Court being advised
overruled said objection.

Q. 59. Will you introduce Sheriff the three reels inside
the larger container as Exhibits 1, 2 and 3 as the reels

(T. 27)

are labeled, with the brown band around them, and the
canister as Exhibit "A"?

A. Yes, sir.

(Filed with Reporter and marked for identification as Commonwealth's Exhibits #1, 2 and 3 and "A".)

Q. 60. Now, will you proceed to the smaller canister and tell us what if anything is in it?

A. There's two reels, Cindy and Donna and here is my mark I put on it the night I seized them.

Q. 61. Now, will you open that canister, what's in the canister now, Sheriff?

A. Two réels marked 4 and 5 continuing of the film Cindy and Donna.

Q. 62. Are those reels in the same condition as they were at the time you took them?

A. Yes, sir.

Q. 63. And is the film on both canisters the same?

A. Yes, sir.

Q. 64. Will you introduce the two reels in the small canister as Exhibits 4 and 5 to your testimony and the canister as Exhibit "B" to your testimony?

A. Yes, sir.

Honorable P. K. Wicker: Objection on the grounds as stated before—

The Court: Overruled.

A. Yes, sir.

Q. 65. You may retake the stand, Sheriff, at the time you viewed the motion picture as you have earlier testified on September 29, 1970, did you make a determination as to whether or not the motion picture appealed to the prurient interest?

A. Yes, sir.

(T. 30)

Q. 67. Sheriff, are you able to show this film you have before you here to the jury?

A. Not in the courtroom here, I'm not.

Q. 68. Why can you not do that?

A. Because it is a commercial type film and it takes special 35 MM cameras to show it and it takes a regular movie screen to show it, and projector.

Q. 69. Subject to the Court's permission have you made such arrangements if the court allows it?

A. Yes, sir.

Q. 70. What arrangements have you made?

A. Arrangements have been made with a local theatre here in town to show it, providing the court permits it.

Q. 71. Now, what theatre are you referring to?

A. The Virginia.

Q. 72. You have rented that theatre, have you?

A. On the basis if the court permits.

Q. 73. But you are paying rent for that theatre to show it there if the court allows it?

A. Yes, sir.

Q. 74. Do you know who the projectionist will be?

A. Nothing only what they told me.

Q. 75. Who did they tell you?

A. Norma Leveridge.

Q. 76. Do you know of your own knowledge whether or not she is a qualified projectionist?

A. I'd say she was.

(T. 31)

Q. 77. You may ask him.

Cross-examination by Mr. Wicker

Q. 1. Sheriff, you say that was on the 29th day of September 1970, that you seized this film and made the arrest?

A. Yes, sir.

Q. 2. Did you see all the film prior to making the arrest and seizure?

A. Yes, sir.

Q. 3. Was there anyone with you?

A. Yes, sir.

Q. 4. Who was with you?

A. The Commonwealth's Attorney.

Q. 5. Mr. Rogers?

A. Yes, sir.

Q. 6. Was there anyone else with you?

A. No, sir.

Q. 7. Did you have any warrant when you made this arrest and seized this film?

A. No, sir.

Q. 8. Now, I believe you stated that following the showing of the film, you went to the projectionist booth and proceeded to arrest Mr. Roaden and seize the film, is that correct?

A. Yes, sir.

Q. 9. Do you know how long Mr. Roaden had been in the projection booth at the time you came in?

A. No, sir.

Q. 10. You had not seen him that night, prior to going in to the projection booth?

A. I didn't go up in the Projection room before.

(T. 32)

Q. 11. Mr. Phelps, had there been any prior determination before a magistrate or a Judge that this film was obscene?

A. Not to my knowledge.

Q. 12. At the time you seized this film and made this arrest, did you know what the definition of obscene was under the Kentucky statute?

A. I had read it, yes, sir.

Q. 13. What does it say?

A. KRS 436.101 Obscene means to the average person applying to a temporary standard predominant appeal of the matter taken as a whole is the prurient interest a shameful or morbid interest in nudity, sex or excretion which goes beyond customary limits and candor description or representation of such matter.

Q. 14. Did you have that with you when you made that arrest?

A. No, sir.

Q. 15. I note that you are using notes, are those your notes?

A. Yes, sir.

Q. 16. Did you copy that out of the Statute, or did someone copy that for you?

A. That's my writing.

Q. 17. Did Mr. Rogers give you the statute book and direct you to make a copy of it?

A. He gave me the number of it.

Q. 18. Did he ask you to do this—

A. No, sir.

Q. 19. Before the trial?

A. No, sir.

Q. 20. Now—

Honorable Harold Rogers: Your Honor, I am going to object to all of this, this is

(T. 33)

extraneous to the matter—

Honorable M. D. Harris: Your Honor, this is the most substantive thing that has come up in this trial yet—

Honorable Harold D. Rogers: I object to the statement of counsel—

The Court: Well, he gave his definition of it, and as to where he got it, he said it came out of the Statute, and so—
Sir?

Honorable M. D. Harris: We don't want to harass the Sheriff, he is a nice fellow, but we say at the time of that seizure that that information must have been within his knowledge—

A. I told you that—

The Court: That's what he testified to, overrule the objection, I mean, I sustain the objection as to any further questions.

Q. 21. Did you see any persons under eighteen years of age in the theatre that night?

A. I wouldn't say that I did, I didn't check their ages I mean I would say no, right off without checking.

Q. 22. I believe that's all.

Re-Direct Examination

Honorable Harold D. Rogers

Q. 1. Did you make a search for who was there, Sheriff?

A. No, sir.

Q. 2. You didn't pay much attention?

A. No, sir, I did not.

Q. 3. Except that they were members of the general public?

A. Yes, sir.

Q. 4. Sheriff, at the time this picture was shown and the

(T. 34)

defendant was arrested, do you know who was the Manager or operator of the theatre itself?

A. Mr. Roaden.

Q. 5. That's all.

Recross-examination

Honorable P. K. Wicker

Q. 1. Is the the first time, Sheriff, to your knowledge there has been any inquiry as to whether a film was obscene in court?

Honorable Harold D. Rogers: That's immaterial to this case—

The Court: I believe that question was asked, was there an adversary hearing, you ask him in court was there an adversary hearing and

Honorable P. K. Wicker: We withdraw the question.

The Court: And he said he didn't know, I mean, not to his knowledge.

The next witness called by counsel for the Commonwealth JAMES STRUNK being first duly sworn, in response to questions propounded to him by the Attorney, stated as follows, to-wit:

Direct Examination by Mr. Rogers

Q. 1. State your name, please?

A. James Strunk.

Q. 2. What is your address?

A. Burnside.

Q. 3. What is your occupation?

(T. 35)

A. Deputy sheriff, Pulaski County.

Q. 4. Are you an employee or a deputy under Sheriff Gilmore Phelps?

A. Yes, sir.

Q. 5. How long have you served in that capacity?

A. Somewhere around four months.

Q. 6. I can't hear you—

A. Somewhere around four months.

Q. 7. I see, thank you, drawing your attention to September 28, 1970, did you at that time have occasion to view a moving picture in the county?

A. Yes, sir, I got a call on some, well, the Sheriff advised me to keep an eye on the movies down there both theatres.

Honorable M. D. Harris: I am going to object to that answer, that is not in response to the question—

The Court: That is not in response to the question.

Q. 8. Now just answer the question whether or not on September 28th, 1970 you had occasion to see a moving picture?

A. Yes, sir.

Q. 9. Where did you see a picture?

A. 27 Drive-In, 27th Highway Drive-In.

Q. 10. Now is that the Highway 27 Drive-In Theatre on South Highway 27?

A. Yes, sir.

Q. 11. Do you know the name of the motion picture?

A. Cindy and Donna.

Q. 12. Did you see all of the picture?

A. No, sir, I didn't.

Q. 13. About what amount of it did you see?

A. The amount that I seen was where the girls was loving—

(T. 36)

Q. 14. Well, now, don't tell what you saw, did you see a small amount of it or a substantial portion of it?

A. I'd say about thirty minutes of it.

Q. 15. And was this at night time?

A. Yes, sir.

Q. 16. Was there anyone there at that time besides yourself?

A. I wasn't in the drive-in, I was on the road outside of the drive-in right beside it.

Q. 17. Now was there anyone inside the drive-in viewing it?

A. Yes, sir, there was cars in there.

Q. 18. Do you know who they were?

A. No I don't.

Q. 19. As far as you know, were they members of the general public?

A. I would say so.

Q. 20. You may ask him.

Cross-examination

Honorable P. K. Wicker

No questions.

Honorable Harold D. Rogers: Judge, I would like the opportunity to recall this witness and Sheriff Phelps after

a motion picture is viewed if the Court allows the same for the purpose of making identification.

The Court: Let it be granted.

Honorable Harold D. Rogers: At this time, Your Honor, I would like to request the Court that the Stipulation be read by the Court Reporter.

(T. 37)

Court Reporter:

STIPULATION

It is stipulated by and between the parties by and through their respective counsel that Norma Leveridge is a qualified commercial projectionist of motion pictures, and that the projector at the Virginia Theatre at Somerset, Kentucky, will exhibit and show a 35 millimeter motion picture film in substantially or exactly the same method and manner as the projection equipment at the Highway 27 Drive-In Theatre near Somerset, Kentucky.

Honorable Harold D. Rogers: Your Honor, at this time, the Commonwealth moves the Court that the jury be allowed to go to the Virginia Theatre in Somerset, Kentucky, in custody of the Sheriff or deputy sheriff to view the motion picture that's been introduced in evidence, along with the court functionaries and the attorneys for the defendant.

Honorable M. D. Harris: Your Honor, before you make your ruling, counsel for the defense wants to object to the jury going to view this film with the sheriff or deputy sheriff who are witnesses in this prosecution who have viewed the film in the first place and are interested in the prosecution.

The Court: Let the Motion be sustained and the objection overruled.

Honorable Harold D. Rogers: Your Honor, I might point out that State Detective Sam King is in the Courtroom or the ante room adjoining the court room, perhaps

he might be able to be in charge of the jury if it is agreeable to the Court—

Honorable M. D. Harris: We respectfully request that some member of the Sheriff's

(T. 38)

staff who was not there and not involved in any way accompany the jury and also Detective Sam King—

Honorable Harold D. Rogers: Your Honor, the Detective, I mean, was not involved in any way.

The Court: I'll permit here Officer Strunk and Detective Sam King to accompany the jury and will request the Sheriff to keep the films in his custody at all times, even from the standpoint of when they are in the projection booth, the Sheriff will remain with the films at all times, in other words, from the time the films leave this courtroom until they are returned, they are not to be out of the presence of the Sheriff, they are to be in the custody of the Sheriff at all times.

The Court: Now, ladies and gentlemen of the jury, I must give you this admonition, I am going to permit you to go to the Virginia Theatre to view this film, you will be seated by the officers in the center aisle of the theatre, no one else will be in that center aisle, if the attorneys go, and the defendant and etc., they may sit on the side, on either side away from the jury, not to be connected with the jury, in any way, the officers will sit a row or two back behind the jury, that's so as to prevent anyone from making any statement and etc., and I am making this statement as to all present, there will be no demonstrations, there will be no words spoken, there will be no acts of any kind done by and between any of the attorneys, the officers or anyone there, and I am instructing the officers now that if anyone should violate that rule, let it be one of the attorneys over here or the Commonwealth's Attorney or whoever it may be, to arrest them immediately for contempt of court because the court is going to be very definite about that, no

(T. 39)

one is to contact the jury or to do anything to interfere with the viewing of the film by the jury.

Now Officer King and Strunk, hold up your hands, do each of you solemnly swear that you will be with this jury while they are in your custody, you will not permit anyone to talk with them about this case or any subject and that you will not do so yourself, that you will not permit anyone while they are in your care and custody to interfere with this jury in any way while you are going to the theatre where this film is being shown, that after it has been shown that you will then return with this jury back to this courtroom.

Now, ladies and gentlemen, what I would suggest, as you go, that one of the officers walk in front of the jury and one of the other officers walk behind the Jury.

We will now recess to go to the Virginia Theatre for the purpose of viewing this film.

Honorable M. D. Harris: Counsel for the defense requests that no other persons go than the court has designated, now that's the jury, Officer Strunk and Officer King, no other persons, counsel for defense will not be there, the defendant will not be there, and we request that no other persons go other than the members of the jury, Officer Strunk and Officer King.

The Court: The Court is going—

Honorable M. D. Harris: The Court is going, well, all right, that's the Court's prerogative.

The Court: I am taking the Court Reporter for the purpose of anything that should happen that should be reported.

Honorable M. D. Harris: That is your will, Your Honor.

(T. 40)

The Court: I would suggest that you and Mr. Wicker—

Honorable M. D. Harris: I will not be there, Judge—

The Court: I suggest further that the Commonwealth's Attorney—

Honorable Harold D. Rogers: I request to go, Your Honor.

The Court: And I suggest that a member of the Press—

Honorable M. D. Harris: We object to anybody of the Press going but if that the Court's ruling—

The Court: Because of the fact there that it is a picture that I mean a—it is a proceeding that should not be entirely behind closed doors.

Honorable M. D. Harris: It isn't the evidence—

Honorable Harold D. Rogers: This is a public trial. It's got to be public—

Honorable M. D. Harris: Comes counsel for the defense and excepts to the court's ruling in permitting officer Strunk, one of the witnesses for the Commonwealth, in accompanying the jury to the showing of the film and further excepts to the ruling of the Court in permitting members of the press to attend the viewing of the film, the Court being advised, overruled said exception to same counsel for defendants object and except. The objection to Officer Strunk on the same grounds as the objection to Officer Phelps, because he is an officer.

The Court:

(T. 41)

Ladies and gentlemen of the Jury, let me admonish you, this at the time we are going out to view the picture, remember not to talk about this case among yourselves, do not permit anyone to talk with you, do not form an opinion about it and do not express an opinion until the case is finally submitted to you for your consideration, while we are going to and from the theatre do not talk with anyone enroute, do not stop and talk with anyone enroute between here and the theatre, after you have seen the picture you will return in a body back to this courtroom and in

returning back to the courtroom you are not to stop and talk with anyone on the street and you are not to talk among yourselves about the picture, when you are returning back to the courtroom, you will only discuss it after the case is submitted to you for your consideration.

The Court: Officer King and Officer Strunk are sworn by the Court.

The Court on its own motion then questioned the officers as follows:

Q. 1. Officer King, you are one of the officers that the Court asked to go to the theatre with this jury, while they were in your custody?

A. Yes, sir.

Q. 2. Did you take them to the theatre?

A. Yes, sir.

Q. 3. And bring them back?

A. Yes, sir.

Q. 4. You are Officer Strunk?

A. Yes, sir.

Q. 5. You were in their company at all times?

A. Yes.

Q. 6. Did they converse with anyone during the time you went to the theatre?

(T. 42)

A. No, sir.

Q. 7. Officer Strunk, you are one of the Officers to take the jury to the theatre?

A. Yes, sir.

Q. 8. And brought them back?

A. Yes, sir.

Q. 9. During the time they were in your custody, did anyone converse with the jury, at any time from the time they left the courtroom until they returned?

A. No, sir.

Mr. Clerk, call the roll of the jury again, please.

Clerk Delvin Holt: Lewis Ledbetter, Neal Childers,

Lynn T. Minter, Carl Helton, Walter Clines, Mrs. Donald Pullen, Mrs. Ernest Brock, Augusta Latham, Eugene Tucker, Orville Alexander, Paul Elliott, Mrs. Henry Gilmore.

Q. 10. Were they all present?

Clerk Delvin Holt: Yes, sir.

The next witness recalled by counsel for the Commonwealth, SHERIFF GILMORE PHELPS, having been heretofore duly sworn, and having heretofore testified in behalf of the Commonwealth, stated as follows, to-wit:

The Court: You are Sheriff Phelps who earlier testified, you are still under oath?

Sheriff Gilmore Phelps: Yes, sir.

Re-Direct Examination

Honorable Harold D. Rogers

Q. 1. Are you out of breath?

A. A little out of breath.

(T. 43)

Q. 2. Sheriff have you just been with the Court and Jury to the Virginia Theatre at a time when a motion picture Cindy and Donna was just shown?

A. Yes, sir.

Q. 3. Did you recognize the motion picture?

A. Yes, sir.

Q. 4. Is it the same movie you earlier testified you saw on the evening of September 29th, 1970 at the Highway 27 Drive-In Theatre on South Highway 27?

A. The same one.

Q. 5. You may ask him.

Re-Cross-examination

Honorable P. K. Wicker

Nothing, Your Honor.

The Court: Let the record show that on the court's own motion the following questions were asked the Sheriff.

Q. 1. Sheriff Phelps you took the films from this courtroom did you not, to the theatre?

A. Yes, sir.

Q. 2. Were they in your custody at all times, from the time you left the theatre until you returned here with them?

A. Yes, sir.

Q. 3. And you have them here with you now?

A. Yes, sir.

Q. 4. And they were in your custody at all times from the time you left the courtroom going to the Virginia Theatre to have them show to the jury until you brought them back?

A. Yes, sir.

Q. 5. O.K., that's all.

(T. 44)

The next witness recalled by counsel for Commonwealth JAMES STRUNK having been heretofore duly sworn and having previously testified in behalf of the Commonwealth, in response to questions propounded to him by the Attorneys, both for the Commonwealth and the Defendant, stated as follows, to-wit:

Honorable M. D. Harris: Comes counsel for the defense and objects to the Court interrogating the witness Gilmore Phelps and in effect prosecuting the case on behalf of the Commonwealth.

The Court: Let it be overruled.

Re-Direct Examination

Honorable Harold D. Rogers

Q. 1. Your name is James Strunk and you are the person who earlier testified in this case?

A. Yes, sir.

Q. 2. Do you recognize, Mr. Strunk, that you are still under oath?

A. Yes, sir.

Q. 3. Did you accompany the jury to the Virginia Theatre to see a motion picture at that theatre, Mr. Strunk?

A. Yes, sir.

Q. 4. Did you recognize the motion picture that you saw there at the theatre?

A. Yes, sir.

Q. 5. Is it the same motion picture that you viewed on September 28, 1970?

A. Yes, sir.

Q. 6. At the Highway 27 Drive-In Theatre?

A. Yes, sir.

(T. 45)

Re-Cross-examination

Honorable P. K. Wicker

Q. 1. Did you buy a ticket when you went in the theatre on the 28th?

A. On the 28th I wasn't in the theatre.

Re-Direct Examination

Honorable Harold D. Rogers

Q. 1. This is the time you saw it from the outside, Sheriff?

A. Yes, sir.

Honorable Harold D. Rogers: Your Honor, that's the case for the Commonwealth.

Commonwealth Closes in Chief

Honorable M. D. Harris: Your Honor, we reserved the right to make an opening statement.

* * * * *

(T. 46)

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The Court: Let the record show that on the court's own motion the following questions were asked the Sheriff.

Q. 1. Sheriff Phelps you took the films from this courtroom did you not, to the theatre?

A. Yes, sir.

Q. 2. Were they in your custody at all times, from the time you left the theatre until you returned here with them?

A. Yes, sir.

Q. 3. And you have them here with you now?

A. Yes, sir.

Q. 4. And they were in your custody at all times from the time you left the courtroom going to the Virginia Theatre to have them show to the jury until you brought them back?

A. Yes, sir.

Q. 5. O.K., that's all.

(T. 44)

The next witness recalled by counsel for Commonwealth JAMES STRUNK having been heretofore duly sworn and having previously testified in behalf of the Commonwealth, in response to questions propounded to him by the Attorneys, both for the Commonwealth and the Defendant, stated as follows, to-wit:

Honorable M. D. Harris: Comes counsel for the defense and objects to the Court interrogating the witness Gilmore Phelps and in effect prosecuting the case on behalf of the Commonwealth.

The Court: Let it be overruled.

Re-Direct Examination

Honorable Harold D. Rogers

Q. 1. Your name is James Strunk and you are the person who earlier testified in this case?

A. Yes, sir.

Q. 2. Do you recognize, Mr. Strunk, that you are still under oath?

A. Yes, sir.

Q. 3. Did you accompany the jury to the Virginia Theatre to see a motion picture at that theatre, Mr. Strunk?

A. Yes, sir.

Q. 4. Did you recognize the motion picture that you saw there at the theatre?

A. Yes, sir.

Q. 5. Is it the same motion picture that you viewed on September 28, 1970?

A. Yes, sir.

Q. 6. At the Highway 27 Drive-In Theatre?

A. Yes, sir.

(T. 45)

Re-Cross-examination

Honorable P. K. Wicker

Q. 1. Did you buy a ticket when you went in the theatre on the 28th?

A. On the 28th I wasn't in the theatre.

Re-Direct Examination

Honorable Harold D. Rogers

Q. 1. This is the time you saw it from the outside, Sheriff?

A. Yes, sir.

Honorable Harold D. Rogers: Your Honor, that's the case for the Commonwealth.

Commonwealth Closes in Chief

Honorable M. D. Harris: Your Honor, we reserved the right to make an opening statement.

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(T. 46)

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The first witness called by counsel for the Defense HARRY ROADEN, being first duly sworn, in response to questions propounded to him by the Attorneys, both for the Defense and the Commonwealth, stated as follows, to-wit:

Direct Examination by Mr. Wicker

Q. 1. State your name?

A. Harry Roaden.

Q. 2. How old are you?

A. Thirty six.

Q. 3. What is your occupation?

A. I am Manager of Highway 27 Drive-In Theatre.

Q. 4. Where do you live?

A. I live at 211 Ohio Street.

Q. 5. Is that in Somerset?

A. Yes.

Q. 6. Pulaski County?

A. Yes, sir.

(T. 47)

Q. 7. How long have you lived in this county?

A. Since 1953.

Q. 8. What has been your occupation during the time you have resided in this county?

A. I have been a theatre manager except for a short time when I was in service from 1953 until 1955.

Q. 9. On September 28, 1970 were you the manager of the Highway 27 Drive-In Theatre?

A. Yes.

Q. 10. Do you own the theatre?

A. No I don't own it.

Q. 11. Do you have anything to do with the pictures that are booked or played in the theatre?

A. No, I just play whatever comes in.

Q. 12. Do you have any control over that?

A. No.

Q. 13. Was there a picture called Cindy and Donna played at the theatre on September 28th of this year?

A. Yes, sir.

Q. 14. Was anyone under eighteen admitted?

Honorable Harold D. Rogers: Objection as being immaterial in this case, Your Honor.

The Court: I'll let him answer it, if he knows, unless he was there and knows, seen them go in there, I think unless he knows, otherwise, if he knows he can answer.

Q. 15. If you know Mr. Roaden, was anyone under eighteen in the theatre?

A. I was in the box office for this purpose, if for some reason I had to leave the box office, I had the Cashier instructed—

The Court: That's not the question, the question is whether they

(T. 48)

were under eighteen years of age—

Q. 16. Was any person under eighteen admitted to see this film?

A. Not except baby in arms.

Q. 17. At any time while this film was playing at Highway 27 Drive-In Theatre did you have any knowledge of the contents of the film?

A. I had no chance to see the film.

Q. 18. Had you received any complaints from anyone during the showing of this movie?

A. No, sir.

Q. 19. The first complaint you had about it was when Sheriff Phelps came to the projection booth?

A. Yes, sir.

Q. 20. On the 28th of September when Sheriff Phelps came to the projection booth how long had you been in the booth?

A. Maybe two minutes.

Q. 21. Why had you gone to the projection booth?

A. At the end of the picture I had told the operator—

Q. 22. Don't tell what you told him, just what you did?

A. I went to the projection room because the cartoon was on upside down.

Q. 23. You may ask him.

Cross-examination

Honorable Harold D. Rogers

Q. 1. Mr. Roaden, who owns the theatre?

A. Highway 27 Drive-In Incorporated.

Q. 2. Who are the stockholders of the corporation?

A. I don't know who they all are.

Q. 3. Do you know who any of them are?

A. I know one of them.

(T. 49)

Q. 4. Who is that?

A. O. G. Roaden.

Q. 5. Is he related to you?

A. My uncle.

Q. 6. Are you a stockholder?

A. No, sir.

Q. 7. You are employed by the corporation to operate this theatre here in Somerset?

A. Yes.

Q. 8. Where, Mr. O. G. Roaden, where does he live?

A. He lives in Harlan County.

Q. 9. Where are the headquarters of the corporation at?

A. The books give it in the office of Highway 27 Drive-In Theatre.

Q. 10. Who is President of 27th Drive-In Theatre, Incorporated?

A. I suppose he is.

Q. 11. Who is?

A. O. G. Roaden.

Q. 12. And you say the corporation hired you to operate the Highway 27 Drive-In Theatre?

A. Yes, sir.

Q. 13. What type duties do you have?

A. Well, see that everything is in working order, the picture is on the screen, if something tears up I have to fix it.

Q. 14. You say that you don't do the booking about what pictures you show, who does that?

A. A booking combine.

Q. 15. Where are the headquarters?

A. I don't know really.

Q. 16. Are they in Somerset, Kentucky?

A. I don't think so.

Q. 17. Where do you get your films from?

(T. 50)

A. A truck brings them and drops them off at the door.

Q. 18. Do you know where the truck comes from?

A. Most all in this area comes from Cincinnati.

Q. 19. Is that where the booking combine is?

A. I don't know, I really don't know.

Q. 20. You are telling the jury that you don't know where these films you show come from?

A. No, sir, I'm telling the jury that they come from Cincinnati.

Q. 21. But you don't know who brings them?

A. Well, sometimes my brother does.

Q. 22. Who is your brother?

A. Ketrey Roaden—

Q. 23. Who is he working for?

A. Well, I don't know who you would say he works for I suppose he probably works for the same organization I do under a different name.

Q. 24. You mean there is another name of the same organization?

A. Well, no, the organization he works for operates other organizations.

Q. 25. You mean they have other theatres?

A. Yes.

Q. 26. Where are they located?

A. London, Harlan, Middlesboro.

Q. 27. Is that operated by the same corporation that your uncle heads up?

A. Which ones?

Q. 28. The ones you have just mentioned?

A. No, sir.

Q. 29. Well who operates these other theatres you are talking about?

Honorable P. K. Wicker: Objection to this line of questioning, we doubt if

(T. 51)

this is proper—

The Court: I'll sustain the Objection as to operating any other theatres.

Q. 30. Now, in your position as manager or operator of this theatre here is it your job to project on the screen and schedule the showing of movies that come to Somerset at your theatre?

A. Well, you see, I have a list of the names of movies and the dates they play and when they come in that's the ones I play.

Q. 31. I see, that's what I say it's your duty to show the film?

A. Yes.

Q. 32. Do you know when Cindy and Donna played Highway 27 Drive-In Theatre?

A. Well, no the pictures behind me I don't know but I suppose you have the date correct.

Q. 33. September the 29th, Tuesday?

A. I would say that you have it correct.

Q. 34. And did it also show on September the 28th?

A. It showed Sunday, Monday and Tuesday.

Q. 35. So it showed then on Sunday the 27th of September and Monday the 28th and Tuesday the 29th, is that correct?

A. Yes, sir.

Q. 36. And is it your testimony, Mr. Roaden, during those three showings of the motion picture that you did not see the motion picture?

A. Yes, sir, I did not.

Q. 37. Its your job to see that those movies—are projected on the screen of Your theatre?

A. Well, its not my job, its my job to—you see—I have an operator, now if the operator hadn't come—

(T. 52)

Q. 38. I ask you this question, is it not your responsibility as manager and operator of that theatre, to see that the movies that come there are projected on the screen in that theatre at the scheduled time?

A. Now I am not the operator of the projector room.

Honorable M. D. Harris: Now, answer the question—

Q. 39. Your Honor, I asked the witness a question—

The Court: Yes, read the question to him—

Reporter: I ask you this question, is it not your responsibility as manager and operator of that theatre, to see that the movies that come there are projected on the screen in the theatre at the scheduled time?

A. Yes, it is.

Q. 40. Now you don't stay at that box office down there all the time, do you, Mr. Roaden?

A. No, sir, I don't.

Q. 41. Where do you stay when you are not at the box office?

A. Well I go around over the field to see if everything is all right and I have a snack bar inside and lots of times I have to be in there.

Q. 42. You have a waitress in there that operates that?

A. No, I operate it myself.

Q. 43. You don't have a waitress who operates that?

A. Oh I have a waitress but she is just a waitress.

Q. 44. Well, she sells the popcorn and cokes and such as that?

A. Well, if she don't, I do.

Q. 45. Now you said you were going over the grounds, what do you mean going over the grounds?

(T. 53)

A. Well, to see if anyone is making a racket, and tearing things up.

Q. 46. Do you announce on the speaker system in your own voice?

A. Yes, sir.

Q. 47. Where do you announce that from?

A. From the projection room during intermission when no movie would be going on.

Q. 48. And it is your testimony that during the three nights that this motion picture was shown in your theatre, that during all of your travels about the grounds, inside the projection booth and the concession stand or anywhere that you were, that you did not see the moving picture on any of those three nights at your theatre?

A. I did not see the motion picture any one of the three nights.

Q. 49. Now, you said that you were not in the box office all the time and then you said that no one under eighteen years of age was in your theatre, is that correct or not?

A. That is correct.

Q. 50. How are you able to say from your own knowledge?

A. From my own knowledge.

Q. 51. From your own knowledge?

A. Because I have a competent cashier.

Q. 52. Well, is she here?

A. No, she is not here.

Q. 53. Well, I thought you said that was from your own knowledge?

A. That's how I got my own knowledge.

Q. 54. Well, then that's from her knowledge, isn't it?

A. Well—

(T. 54)

Q. 55. Then you can't say—swear to this jury beyond any question of a doubt that no one under eighteen was in that theatre, from your own knowledge?

A. Well, no, because some one could have come in, in the trunk.

Q. 56. That's all.

Honorable P. K. Wicker: Stand aside.

Defense Closes.

(T. 94)

ARGUMENT OF COUNSEL FOR DEFENDANT

Honorable P. K. Wicker: May it please the Court—

The Court: Mr. Wicker.

Honorable P. K. Wicker: Mr. Rogers and you twelve ladies and gentlemen of the Jury.

If the film which you saw yesterday was all that was on trial here, I would not be here, I would be good enough to tell you at the outset that, in behalf of Mr. Roaden, I am not going to get up here and defend the film observed yesterday nor the revolting scenes in it or try to argue or persuade you that those scene were not obscene.

What I do want to do is talk with you about though is Harry Roaden, because in connection with this film he is also on trial, Harry Roaden took the stand yesterday in his own defense after you had viewed this movie.

He testified that he did not own the Highway 27 Drive-In Theatre that he did not book or select the pictures that were shown

(T. 95)

there; Harry Roaden did not operate the machines that were showing the picture; Harry Roaden did not reap any profits from the showing of this picture to the persons who observed it, Harry Roaden worked there.

Now, he testified that even though this picture had shown for two days that he had duties, that he had duties in the cashier's booth, in the front of the theatre, that there were duties to be performed in the concessions stand and generally in running the theatre, and that he was not aware of the contents of the movie.

Now, ladies and gentlemen, I don't have any doubt but that you will find the content of that film obscene, but I do have doubt that you will find Harry Roaden guilty, as the court tells you in Instruction No. 3, of wilfully and unlawfully exhibiting to the general public an obscene motion picture film entitled "Cindy and Donna", the defendant having knowledge of the obscenity thereof—having knowledge of the obscenity thereof!

Now, ladies and gentlemen yesterday when all of you were called to the jury box, you were asked would you require the Commonwealth of Kentucky to prove this man guilty beyond a reasonable doubt and you each answered that you would require such proof and such evidence.

I submit to you today that there was not a line, phrase or word of evidence offered to you to prove that even though this film was shown down here, that this man Harry Roaden, who only worked there, was aware of its contents.

Nor is there a word, phrase or line of evidence offered by the Commonwealth over here that anyone that anyone under the age of eighteen years was admitted to this movie, or that any juvenile saw it or as bad or as revolting or as sinful as the movie was that anyone was harmed by it.

(T. 96)

While this film leaves little to recommend it, nothing to recommend it, the State has failed to prove that Harry Roaden had any knowledge that the film was obscene.

I call your attention to Instruction #6. The law presumes the defendant Harry Roaden, innocent until proved guilty beyond a reasonable doubt and if you have a reasonable doubt that the defendant has been proved guilty then you should find him not guilty.

Now, my friend, Mr. Rogers over here is very persuasive and no doubt he is going to get up and review with you scene by scene the disgusting elements of this film but if he does do that, that still does not mitigate the requirements that the State prove beyond a reasonable doubt that this man had knowledge of the obscenity of the film, nor has there been a line, phrase or word of evidence offered by anyone that anyone ever complained to Mr. Roaden that the film was obscene.

Harry Roaden is on trial but he only worked there, he didn't reap the proceeds from the film, he didn't operate the machines and he wasn't aware of the film's content, the State was required to prove him guilty beyond a reasonable doubt, I submit to you that although you may find that this film was obscene that you can still find Harry Roaden not guilty, because it has not been proven beyond a reasonable doubt that he knew the content of this film. Thank you very much.

(T. 97)

ARGUMENT BY COUNSEL FOR COMMONWEALTH

Honorable Harold D. Rogers: May it please the Court—

The Court: Mr. Rogers.

Honorable Harold D. Rogers: Mr. Wicker and Mr. Harris, ladies and gentlemen of the jury.

First I would like to say to Mr. Wicker and Mr. Harris what fine gentlemen they have been in the trial of this case at times we lawyers have difficulty in arguing our motions and different questions but these two gentlemen are gentlemen on all occasions I have found to be true, they are perfect gentlemen.

First of all, I would say to this jury, thank you, for being on this jury and taking time out of your busy schedule to serve on this jury, do your community and your county a service by fulfilling your duty by sitting on this case. I know for some of you, perhaps many of you, I am sure all of you, at times this has been embarrassing and I am sure it has tugged at your better conscience and your values, and I apologize for your having to view this motion picture but it is evidence in this case.

As we said in the beginning, when we asked you in the beginning if you realized that this was a criminal prosecution for which the defendant, if you Judge him guilty, may receive a jail sentence and money fine if the jury find him guilty, and all of you at least acknowledge by your seriousness that you are aware of that and so its no small matter but ladies and gentlemen of this jury, this is a vital case, this is an important case, perhaps the most important of this term of court, because it has most far reaching significance.

Before I say anything further I want to preface my remarks

(T. 98)

to you by saying that this is your chance, this is this jury's

chance, to do something about the filth and smut you saw yesterday, you have the opportunity not the United States Supreme Court, in this case, but this jury has that opportunity, these twelve people and no more.

And, I ask you in the name of the Commonwealth in this case, do something and do not worry about the far reaching consequences because bear this in mind, your decision in this case can and will have far reaching meaning and I urge you to bear that in mind as well.

This case is more important than a murder case because in a murder case the victim is at least dead and not to live a living death, in many cases as the smut and filth we saw yesterday may cause to those young adults that may view that moving picture, in their own cars, in that theatre, the living death that such a crime causes to many young adults is worse than murder; this case is worse than any pollution case that you can have before you because what can be worse than filth of the mind and spirit of those young people, I think than that sort of trash; this case is worse, I think, than any shooting with intent to kill or wounding someone with a knife or gun because in those cases the body has the ability to heal itself and become whole again but that kind of pollution to the body, mind and soul cannot be repaired then in many cases, it goes on forever in the life of the people affected by it, do something, this is your chance.

If we wish to live in a place that I can best describe by referring to Sodom and Gomorrah, does this moving picture remind you all of anything more like Sodom and Gomorrah than this movie is in obscenity, but if you wish those young adults who view that picture, if you wish

(T. 99)

those people to be saved from turning into a pillar of salt then you will declare this movie to be obscene and you will find this defendant guilty as charged.

Now, Mr. Wicker is absolutely correct, I am going to review portions of that moving picture to you, I don't think we need to, I think it is indelibly in your mind, you can't remove it. I realize that you, at the time you saw this picture, you were shocked beyond belief, you were amazed that this moving picture was shown to the general public out in Pulaski County, Kentucky, not once, but three consecutive times by this defendant, he comes here and has the audacity to say to you, I didn't know what was in it, I never saw it, I never saw one scene, I didn't notice, as I walked around the grounds in the projection booth or in the concessions stand or at the ticket booth on any one of the three nights I was there as the manager of that theatre, charged with the operation of the moving picture show, I didn't know what was being shown, despite the fact that in every scene there were at least two, three or four people completely nude on extremely compromising positions on beds, couches and floors, this man says he didn't know what his entertainment was, I think this jury is going to charge him with knowing what he shows at this moving picture theatre. I don't think you are going to tolerate this kind of activity, in this county, much less, I don't think you will tolerate this kind of defense in saying, excuse me, I didn't know what I was showing—

Honorable M. D. Harris: Your Honor, objection and we take exception, Mr. Wicker and I have presented a defense and we take exception to the remarks of Mr. Rogers—

The Court: I think the Commonwealth, as long as he stays in the

(T. 100)

record, he can refer to the defense that he made, let the objection be overruled.

Honorable Harold D. Rogers: Ladies and gentlemen of the jury, that you wouldn't want testified to on the interrupted argument, for that forgive me and not the case,

and I hope and trust that I am staying exactly within what the defendant told you or the reasonable conclusion, didn't this defendant come here and tell you, I didn't know what was in it, I think it was reasonable since he was the operator and manager, charged with the responsibility of showing the pictures that came there in his own words from a book corporation that is owned and managed by his Uncle and his brother, and I say to you that the corporation is nothing more than a—

Honorable M. D. Harris: Objection as to the opinion, there is no evidence about the corporation—

The Court: Yes, I will sustain the objection to that statement and the jury will not consider that for any purpose whatsoever.

Honorable Harold D. Rogers: I am sorry, Your Honor, referring to the defendant's statement, he himself, if you will recall, when I asked the defendant or maybe Mr. Wicker asked the defendant where he was when the sheriff came and he said he was in the projection booth, the sheriff testified the same things, when he went to get the film after it was shown, that the defendant was in the projection booth where the machines were but the defendant when he got on the stand said he had only been there about two minutes at that time, he testified the reason he went in the projection booth was to tell the operator that the comic, the cartoon, was shown upside down, he went in

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there to ask him to change it, ladies and gentlemen, if he noticed the cartoon, surely he was going to notice the main headline feature so I don't think this jury is going to deal too much with the statement the defendant didn't know what was showing.

I would like to review the motion picture, Mr. Wicker has already told you he considered it to have no value whatever, a sinful moving picture, I am sure this jury has

no reservations about that, and the teachings that that moving picture has for the young adults and everyone else that goes to see that picture, now, bear in mind, and I am sure you will, that those young adults that go to see that picture in their cars, alone late at night and in the drive-in theatre, that that moving picture has teachings just as important, stay in their young lives and much more intently in their minds than any teachings they receive in school or Sunday school and church.

Because the teachings in this motion picture and that these things that are portrayed on the screen are commonplace by people of that age group, that it is common practice to do what they do, it is the thing to do, and if you don't do it, you are some kind of a chicken, assuming was there things, made them of all teachings or involved not just nudity or going with not much clothing on, that's not the particular teaching, the picture teaches adultery by the husband who leaves his wife and daughter and step daughter at home and goes out on the town, drinking and cavorting and finally winds up in bed with this nude dancer after her dance at a night club, you obviously saw the scene of the dancer and the husband on the couch together, shocking to the conscience to see such portrayed on a public screen, the drunken mother at home abandoning the

(T. 102)

two children, passed out on the bed, watching TV drunk while her daughter slips out the back door and goes out to the back grounds to a car beside the house and portrayed the scene making love to her boy friend under the influence of marihuana.

Meanwhile, the scene shifts back from the mother in bed, drunk and passed out, to the daughter, the step daughter in the car making love to the young man smoking marihuana, then it shifts back to the house in the bed to the prostitute, these are the teachings of this moving

picture, these are the teachings in our community to the young adults who go down there and watch that film at that theatre at night and the statements that are made in the motion picture, I recall one I made a note of at the time the girl there would make the statement, things are groovy when you are high, similar statements about the effects of marihuana and drugs or sex, and the 17 year old half sister of the young girl in the car, sneaks out of her bedroom and watches the entire proceedings, she said the next day, viewed her sister until she was completed, and then the mother of one of the girls is on her bed drunk, one of a number of the most revolting scenes in the moving picture was when Pete comes in drunk after he was unsuccessful in his attempt to contact the dancer, and while under the influence of some type of beer or liquor he crawls into the bed with his naked step daughter and the lewd and obscene that follows that.

Now, this is the teachings of this picture, we needn't talk about the influence that it has on people, that goes unspoken, Susan, friend of Cindy together on the beach, Susan out to teach Cindy some of the worst lewd scenes in the beach cabin between the two young girls and the two young men, can there be any mistake about what the

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moving picture shows, on the occasion with the man while Cindy is fighting off her supposed lover, can there be any doubt about what is shown, then Cindy makes her decision to get high on drugs of her sister's which she has found bearing in mind that Cindy is 17 years old, then one of most revolting scenes that the picture depicts is the actions between Cindy and the girl named Susan in the moving picture, the next morning the scene when Susan speaks to Cindy and thereby the world and all who viewed the motion picture sees themselves, she said to Cindy, you have got to try the real things, this thing between us is something thats

just passing, you've got to try the real thing, get you a boy friend, go out with him, you've just got to be with a man and so on and so forth, then Cindy takes off on her own then to find her own men, meanwhile her older sister is in a nude picture taking scene with three or four young men who after finishing taking pictures attempt and do take other things, while one of them, her supposed boy friend, sits off on the couch laughing and sneering, can there be any doubt about the teachings it has for young adults that go to see it, and all other people, can there be any doubt that this jury should find that the motion picture, No. 1 is obscene as the court has allowed you to do on the instructions and No. 2, to show your intolerance of this sort of thing by finding the defendant guilty of showing this motion picture.

Now, and about the instructions, read the instructions, don't get confused about the high sounding words and phrases that the law is made up of, don't get away from the simple issues, there are two things that the Commonwealth would like for you to do, No. 1, find the motion picture obscene and write your verdict on the back of the instructions.

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No. 2 to find the defendant guilty of showing that motion picture and fix his punishment as the jury sees fit and secondly write on the back of the instructions a second verdict, you've got to do both if you find the defendant guilty, write two different verdicts, but don't get confused, as I have said before by the complicated wording, I don't believe this jury will tolerate this sort of smut and filth being shown in Pulaski County, Kentucky, by anyone.

Bear in mind those instructions, they don't require the accused to be the owner of the picture or have control about what pictures are shown, although this defendant by his own testimony says he was the manager and operator and

had duties of showing the motion picture but the instructions and the law don't require anything more than the picture be shown with knowledge of its obscenity.

I don't believe the jury will tolerate that, now is the time, you have the opportunity in your hands as no one else does, to stand firm, to stand up, to stand up, to say yes, I can do something, I will do something, I will do something, my actions will be heard from a long way, this is your chance, this is your time, again, thank you.

You've got to do both if you find the defendant guilty, write two different verdicts, but don't get confused as I have said before don't get confused.

Thank you for trying this case and for listening for I know that your verdict whatever it may be will come from the hearts and minds and souls of twelve very important people of Pulaski County, Thank you.

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INSTRUCTIONS OF PULASKI CIRCUIT COURT TO JURY

(R. 9-12)

The Court instructed the jury as follows:

Commonwealth of Kentucky - - - - Plaintiff

v.

Harry Roaden - - - - Defendant

INSTRUCTIONS

Instruction No. 1

If the jury believe from the evidence beyond a reasonable doubt that the motion picture film, "Cindy and Donna", is obscene then the jury will find the said motion picture film, "Cindy and Donna" to be obscene. You will then

write your verdict on the back of these instructions in the following manner:

"We the jury find the motion picture film entitled, 'Cindy and Donna' to be obscene."

Instruction No. 2

If the jury believe from the evidence beyond a reasonable doubt that the motion picture film, "Cindy and Donna", is not obscene then the jury will find said motion picture film, "Cindy and Donna" not to be obscene and find the defendant not guilty. You will then write your verdict on the back of these instructions in the following manner:

"We the jury find the motion picture film entitled, 'Cindy and Donna', not to be obscene and find the defendant not guilty."

Instruction No. 3

If the jury find from the evidence beyond a reasonable doubt that the motion picture film, 'Cindy and Donna', is obscene, and,

If the jury further believe from the evidence beyond a reasonable doubt that in the County of Pulaski, State of Kentucky, on or about the 29th day of September, 1970, and within 12 months before the finding of the indictment herein, the defendant, Harry Roaden, wilfully and unlawfully exhibited to the general public an obscene motion picture film entitled, "Cindy and Donna", the defendant having knowledge of the obscenity thereof, if it was obscene, then the jury shall find the defendant, Harry Roaden, guilty as charged in the indictment and fix his punishment at a fine of not more than \$1,000.00 or by imprisonment in the Pulaski County Jail for not more than six months or by both such fine and imprisonment in your discretion.

If you find under the instruction No. 3, you will write your verdict on the back of these instructions.

Instruction No. 4

"Obscene" as used in these instructions means that to the average person, applying contemporary standards, the predominant appeal of the matter, taken as a whole, is to prurient interest, a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters, and the dominant theme of the material, taken as a whole, is patently offensive because it affronts contemporary community standards which are national in character relating to the descriptions and representations of sexual matters; and the material is utterly without redeeming social value and that all of the above requirements as used in this definition must coalesce and exist at the same time.

The word "prurient" as used in these instructions means impure in thought; lustful; sensual and sex desire.

Instruction No. 5

You are further instructed that the definitions of said words and phrases contained in these instructions are as follows:

"Average" means norm or middle way between two extremes.

"Contemporary" means gauge, definite, rule, principle or measure.

"Predominant" means to prevail or to have mastery.

"Morbid" means taking an excessive interest in matters of a gruesome or unwholesome nature; hideous; monstrous, frightful.

"Excretion" means useless or harmful material.

"Candor" means disposition to fairness, impartiality out-spoken, frankness.

Instruction No. 6

The law presumes the defendant, Harry Roaden, innocent until proved guilty beyond a reasonable doubt, and if you have a reasonable doubt that the defendant has been proved guilty then you should find him not guilty.

Instruction No. 7

If you find a verdict in this case all 12 jurors must agree. One juror may sign the verdict adding after his or her name the word "Foreman".

FOLDOUT(S) IS/ARE TOO LARGE TO BE FILMED